



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 8 OF 2015

SIXTY FOUR CIVIL WORKS LTD.PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF BUNGOMADEFENDANT

RULING

[1] This application is made under Section 1A, 1B, and 3A of the CPR and order 10 Rule 11 of the Civil Procedure Rules.

The applicant, firstly, seeks for a stay of execution of the interlocutory judgement entered on 25th November 2015 against the applicant pending the hearing and determination of this application inter partes

[2] Secondly, the applicant seeks an order that the exparte judgement entered on 25th November 2015 be set aside and the applicant be granted leave to file his defence.

[3] The basis of the applicant's application is that the applicant filed his Memorandum of Appearance on 11th November 2015. That the expiry of the 15 days prescribed by law for filing his defence ended on 25th November 2015.

That the interlocutory judgement entered on 25th November 2015 is unlawful irregular and premature. He argued that the applicant had filed a defence on 25th November 2015 but could not file it since the court file could not be traced

for the assessment of court fees and eventual payment. The application is supported by the affidavit of Andrew Kituyi the counsel conducting the application.

[4] The respondent who was served by prepaid post filed a replying affidavit and opposed the application. He however did not attend the court to argue the application though served. In his replying affidavit he argued that the application is misconceived, unfounded and an abuse of the process of the court. He argued that under Order 7(1) of the CPR 2010, the defendant has 14 days not 15 as alleged. He argued that on the 14th day the applicant had not yet filed his defence and that the respondent accordingly applied and obtained the judgement thereof. Further, he argued, that the applicant was casual and indolent resulting on the judgement being entered. He argued that he was perfectly within his legal rights to apply for the entry of judgement, and execution of the liquidated claim.

[5] These are the pertinent issues as at this stage. I will not deal with the other issues that seem to deal with the merits of the suit. The issue for determination herein is simple

Was the entry of judgement by the deputy Registrar of this court regular?

The applicant herein entered a Memorandum of Appearance on 11th November 2015 after the service. This Memorandum of Appearance is not challenged and it is not in dispute.

[6] Under Order seven Rule 1, the applicant was supposed to file his defence within fourteen(14) days after filing the Memorandum of Appearance. Fourteen days started to run from 12th November 2015 and were to end on 26th November 2015. However, the respondent herein by a request for judgement dated 27th November 2015 but stamped received by the court on 25th November 2015 a judgement was entered by the Deputy Registrar on the 25th November, 2015.

[7] It is quite strange that the judgement would be entered two days before the request was made by the respondent. The question that begs is, who moved the court to enter judgement, accept court fees and make orders on the 25th November 2015? I stated earlier that 14 days from the day the Memorandum of Appearance was filed ended on 26th November 2015. The court takes Judicial Notice that 26th November was declared a public Holiday by the Government (this was the day his Holiness the Pope of the Catholic church was to celebrate a mass in Nairobi). It follows therefore that the days available to the applicant to file his defence were therefore to end on 27th November 2015. Pursuant to Order 50 Rule 2 which excludes Sundays and Public holidays.

Entry of judgement was only therefore open to the respondent herein on 28th November 2015.

[8] The judgement entered herein by the Deputy Registrar on 25th November, 2015 was irregularly obtained. It was not due. A miscarriage of justice was occasioned by its entry. The said judgement is set aside and any subsequent orders made pursuant to the said order are also set aside.

A defence which was filed on 3rd December 2015, shall be deemed as properly filed. This case shall be fixed for hearing by the parties herein on merits. This is of course after complying with Order 11 of the CPR.

The costs of this application shall be to the applicants.

S.MUKUNYA

JUDGE

17/12/2015